IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

MISC. PETITION NO. 11 OF 1996

S.S. Mhatre & others. Petitioners.

vs.

State of Maharashtra & Ors. .. Respondents.

Mr. A.Y. Sakhare with B.B. Saraf with Y. Chaudhari i/by Prakash & Co. for petitioners.

Mr. R. Subramanian with Mr. A.Sayed and A. Pujari i/by M/s. Dhru & Co. for Respondent Nos. 10(a) to 10(e).

Ms. A.B. Kapadia i/by Daphtary Farreira & Diwan for Respondent nos. 4 to 7.

Mr. P.G. Lad for Respondent Nos. 1 & 2.

Mr. L.V. Govilkar for Respondent No. 3.

CORAM : S.U.KAMDAR, J.

DATE : 6th APRIL, 2005.

ORAL ORDER :

1. The present petition is filed inter alia seeking relief that the order dated 11.1.1994 passed in Misc. Petition No. 43 of 1993 sanctioning the sale of the property by the Board of Trustees to the original respondent no. 10 be recalled and set

aside. Further reliefs is also claimed that the said agreement for sale be declared null and void. Pending the hearing of the petition it is claimed that this Court should grant injunction restraining the respondents from implementing the said agreement dated 14.2.1994. Some of the background material facts in which the present reliefs are sought briefly set out are as under :-

2. On 6.11.1930 a scheme was propounded before this Court in respect of Worli Gupchar & Bhoeye Sansthan Trust. The said scheme inter alia provided the said object as a charity and for the benefit of the members of Pathare Kshatriya Caste community. Under the said scheme all the assets and properties vest in the Official Trustee appointed by the State. However under clause 9 it has been provided that Malaks can be appointed on the Board of Trustees for management of the said trust. It has also been provided that all immovable properties shall vest in the official trustee appointed by the State Government. On 18.3.1935, a lease was granted by the Municipal Corporation for Greater Bombay of a plot of land which inter alia provided for construction of buildings on the said plot of land by Hindus. The said lease was for 999 years. On the said plot of land premises were constructed by the trust and let out to the tenants belonging to the said community. The Bombay Public Trust Act

came into force in 1950. It is the case of the applicant that subsequent to the Bombay Public Trust Act coming into force the provisions of the said Act applied and, therefore, the scheme is governed by the provisions of the same.

3. It seems that a proposal was formulated for redevelopment of the said property belonging to the trust. On 20.10.1992, a proposal was submitted by the trustees for development of the trust property which is situated at Worli, Mumbai. It seems that there were disputes and differences in respect of the proposal for redevelopment of the property among the members of the board. However, ultimately a petition was filed in this Court being Misc. Petition No. 43 of 1993. The said petition was filed sometime in November, 1993. The petition was filed by the Board of Trustees and an official trustee was made respondent to the said petition. According to the petitioner the Board of Trustees who were the petitioners in the said misc. petition No. 43/93 has not brought to the notice of this Court certain documents i.e. the correspondence which preceded the proposal. It was also not disclosed that there was legal advice tendered to the board against sanctioning of the said proposal. On 11.1.1994 said petition came up for hearing and by an order dated 11.1.1994 the learned Single Judge of this Court (Vyas J.) granted the said petition

and the same was made absolute in terms of prayer clauses (a) and (b) thereof. It is this order which has been the subject matter of challenge in the present misc. petition.

4. The present misc. petition is filed by four persons claiming themselves to be the beneficiaries of the said Trust. In the present petition, the only question which has been raised by the learned counsel for the petitioner is that the order passed in the misc. petition no. 43 of 1993 is nullity and invalid in law because in view of the provisions of the Bombay Public Trusts Act, it is the Charity Commissioner who is only empowered under the provisions of the Bombay Public Trust Act to grant sanction under Section 36 thereof and this Court had no jurisdiction to grant any such order of sanction of the said proposal. On the aforesaid ground it has been contended that the order passed by the learned Single Judge on 11.1.1994 be recalled and set aside.

5. I am not inclined to grant the present relief in the misc. petition for more than one reason. These reasons I will set out hereinunder briefly.

6. Firstly, this Court being the Court of coordinate jurisdiction has no power to recall

and/or set aside the order which has achieved finality in misc. petition no. 43 of 1993. This Court has no power to review the legality and validity of the order passed by the other learned Single Judge of this Court. Both the Courts being courts of coordinate jurisdiction, judicial discipline demands that I cannot go into the legality and validity of the said order passed by my Brother learned Single Judge.

7. Secondly, the order passed by the learned Single Judge in Misc. Petition was passed on the application of the Board of Trustees. The Board of Trustees are the persons who are in charge of the management of the said trust. The official trustee was also a party to the said proceedings being respondent no. 10. The present petitioners merely because they are beneficiaries they do not acquire any right to challenge the order passed by this Court in a petition preferred by the Board of Trustees and thus also I am not inclined to grant any relief in the present case.

8. Thirdly, in so far as the petitioners herein are concerned, namely, the petitioner nos. 1 and 3 were also the petitioners in Writ Petition No. 3356 of 1995. In the said writ petition also similar issue was raised namely, that this Court has no jurisdiction because the provisions of the Bombay

Public Trusts act apply to the said trust and, therefore, to sanction the said sale only the Charity Commissioner was empowered to do so. In fact the writ petition which arose from the judgment of the learned trial Court i.e. the order passed in Charity Application No. 13 of 1995, very similar arguments were advanced before the trial Court. In paragraph 3 of the said order of the trial Court, the learned Court has considered the very order of the learned Single Judge of this Court dated 11.1.1994 in Misc. Petition No. 43 of 1993 which has been sought to be recalled (Vyas J.) and while doing so, the learned trial Court has stated as under :-

> "Apart from this, that the petition is an improper act on the part of the appellants, the appellants and/or the others have been taking steps at various stages in various courts and even challenging the very same order of Vyas J. of 11.1.1994 either by a Miscellaneous Petition or by an appeal or by Charity Application before the Charity Commissioner. In so far as this aspect is concerned, the first order of 11.1.1994 sealed the fate of the dispute by the order of Vyas J. and, thereafter all proceedings that have been initiated are barred by Principles of res-judicata or the principles

> of dialogues thereto. The very same consent of grant of permission which was the subject-matter of Miscellaneous Petition No. 43/93 wherein order is passed on 11.1.1994 after hearing are also granted permission for alienation is under challenge by various other proceedings either by the present applicants or by the persons who are also claiming to the beneficiaries under the same Trust. The mulfariousness of the proceedings or numerous proceedings on the same aspect are not permissible under the Provisions of the C.P.C. and, therefore, I have no hesitation in coming to the conclusion that the present petition is an abuse of the process of the Court."

It is this order of the trial Court which was the subject matter of the writ petition and while dismissing the writ petition and rejecting the contention of the petitioners therein who are also petitioner nos. 1 and 3 herein the learned Single Judge of this Court (A.P. Shah, J.) has held as under :-

> 1. In this petition arising out of an application under Section 41E of the Bombay Public Trust Act, 1950 ("Act" for short), the petitioners have made the following

prayers :

" (a) that this Hon'ble Court be pleased to declare that the Agreement for Development dated 14th February 1994, being Exhibit 'A' hereto is null and void and not binding on the Worli Gopchar and Bhoye Sansthan;

(b) that this Hon'ble Court be pleased to declare that the order dated 11th January 1994 passed by His Lordship Mr. Justice N.D. Vyas in Misc. Petition No. 43 of 1993 is non-est and not binding on the petitioners or The Worli Gopchar and Bhoye Sansthan.."

I am constructed to observe that the prayers are wholly misconceived and not maintainable in law. Mr. Tulpule, learned counsel for the petitioners, however, made some submissions with reference to the judgment of the Division Bench of this Court in Charity Commissioner, Maharashtra State v. Smt. S.L.C. Foundation Trust (AIR 1990 Bombay 189). However, before i deal with the submissions of the learned counsel, I would like to briefly state the factual background of the case."

Even while dealing with the arguments, the learned Single Judge, (A.P. Shah, J.) has rejected the arguments on merits of the learned counsel by relying upon the notification issued by the State Government exempting the operation of the provisions of the Bombay Public Trusts act in so far as those trusts are concerned where the official trustee is the sole trustee for the management of the affairs of the trust.

9. Fourthly, some of the other beneficiaries also filed another Misc. Petition in this Court being Misc. Petition No. 65 of 1994. The said Misc. petition was also for identical reliefs. Prayer (a) of the said misc. petition reads as under :-

> "(a) This Hon'ble Court be pleased to set aside the order dated 11.1.1994 in Miscellaneous petition no. 43 of 1993 passed by this Hon'ble Court."

This miscellaneous petition has also been dismissed by the learned Single Judge of this Court (Rane J.) by order dated 8.6.1995 wherein the petition was dismissed as withdrawn. It is now this set of four beneficiaries has filed the writ petition on the identical cause of action and identical prayers.

10. Fifthly, the petitioners have not impleaded the developer as a party though original respondent no. 10 was impleaded as a developer on his death the legal heirs are brought on record but the petitioners being aware of the fact that there has been a transfer of rights in favour of the new developer, namely, Pathare Construction & Investment Pvt. Ltd., a company incorporated under the Companies Act were not joined as a party to the present proceedings. Exhibit F to the petition is a copy of the development agreement executed by the Worli Gupchar & Bhoeye Sansthan Trust in favour of the said company namely Pathare Construction & Investment Pvt. ltd., with original deceased respondent no. 10 Narayan Shankar Pathare as a confirming party. Granting of any relief in the present petition is likely to affect seriously rights of the new developer because agreement in his favour is likely to become invalid and therefore he is necessary and proper party to the present petition. In view of the aforesaid facts it is clear that necessary and proper party is not impleaded as a party to the present proceedings thus present petition cannot be entertained.

11. Sixthly, it is also an admitted position that the said development agreement has been acted upon since there was no injunction restraining the

developer from taking steps. In pursuance of the implementation of the said development agreement two buildings are constructed by the said developer for rehabilitation of the existing tenants and 72 tenants have been accommodated in newly constructed two buildings. In so far as the sale component in open market is concerned also the building is constructed approximately upto 30th floor and the developer who is not before me might have even entered into sale agreements with various third parties. In view of the aforesaid facts, to claim that this Court should set aside the said development agreements on the ground that sanction granted by this Court under order dated 11.1.1994 is totally inequitable and in my opinion it is not possible to revoke the said agreement. The developer has already acted upon and substantially worked out the said agreement and now to revoke the sanction would mean to put the clock back to the stage as if there was no agreement. Seventy two tenants have already been housed in the newly constructed buildings. The sale component building is already fully constructed and the developer has already spent and invested huge amount of money and that also on the basis of the representation that the sale has been sanctioned by this Court is legal and valid. However, the learned counsel for the petitioners contends that the said agreement has been acted upon by the developer knowing fully well

that the present petition is pending. Firstly, the said developer is not party to the present petition and secondly even if he is aware of the said fact it does not mean that the present petition should be granted. It was open for the petitioners to have obtained interim orders in the present misc. petition and prevented the construction being carried out further. However, advisedly the petitioners have not done so knowing fully well that the dispute is already decided by various orders passed by this Court as enumerated hereinabove.

12. In my view, on the aforesaid grounds, the present petition must be summarily dismissed. The petitioners are abusing the process of law and litigating again and again to reagitate the same issues. Even the present petition they have insisted to proceed with it in spite of the aforesaid facts. The learned counsel for the petitioners however contended that the issue whether the Bombay Public Trusts Act applies or not is still open issue before the Division Bench in W.P. 6435 of 2000 and, therefore, he is entitled to agitate the same before me in the present misc. petition. I am not inclined to accept the aforesaid contention. Mere admission of the writ petition cannot mean that the issue which is already determined by this Court are still kept open for agitation. In any event, admission of the petition

cannot be an obstacle for me to decide the present petition.

13. Even while considering the matter on merits I find that there is no substance in the arguments advanced by the learned counsel or the petitioners. On a plain and simple reading of the scheme which the learned counsel has taken me through it is clear that the official trustee is vested with the properties and all the assets of the said Trust. The relevant clause being clause no. 2 (iii) defines Official Trustee and it says that the official trustee shall mean the official trustee of Bombay as appointed under the Indian Official Trustees act (Act II of 1913) or any other Act for the time being in force. Clause 2 (viii) of the said scheme defines the trust properties and states that the trust properties shall mean and include all the properties movable and immovable that form for the time being the entire corpus of the estate belonging to the said Charity and is vested as hereinafter provided for, in the Official Trustee in trust for the said Charity. Thus, from the aforesaid two provisions of the scheme itself it is clear that the official trustee is the only trustee and all the properties are vested in the said official trustee. However, the learned counsel for the petitioners has contended that clause 2 (vii) provides for malaks and the adult lineal descendants

in the male line of such members of the Pathare Kshatriya Caste. It has also been contended by the learned counsel for the petitioner that under clause 6 there has to be a Board of Managing Trustees and it is provided under clause 7 that five persons shall constitute the first or original members of the said Board. It has been contended by the learned counsel for the petitioners that the provisions of the Bombay Public Trusts Act are applicable because the official trustee is not the sole trustee as per the notification and, therefore, notification has no application. In my opinion, the said contention is fallacious. Apart from the aforesaid, clause 26 is clear wherein it provides that power of management shall be only for day to day affairs. However, it will be subject to the limitation of the permission of the official trustee and it is the official trustee who shall use, manage and administer the said properties as provided in the said clauses and it is only with the permission of the official trustee that the Board of Trustees can function. Thus, on a true and correct interpretation of the scheme it is clear that the official trustee is vested with all the assets in the properties and assets and is a sole trustee for the administration of trust and the Board of Managing Trustees is constituted for the purpose of carrying on day to day management of the Trust subject to the permission of the official trustees..

Clause 36 of the Scheme provides that all the powers are vested with the official trustee and, therefore, the official trustee is the sole trustee. In my opinion, therefore, the notification dated 9.10.1980 issued under sub-section (4) of Section 1 inter alia exempted the trust in respect of which the official trustee is appointed as the sole trustee from the application of the Bombay Public Trust Act applies with full force and, therefore, the present trust is not covered by the provisions of the Bombay Public Trusts Act, 1950. In view of the aforesaid the order passed by this Court on 11.1.1994 in Misc. Petition No. 43 of 1993 is correct, legal and valid order and is within its jurisdiction to pass. Thus, even on merits, there is no case made out by the petitioners in the present case. Accordingly, the present misc. petition is dismissed. In view of the conduct on the part of the petitioner and in view of my finding that the present petition is nothing but abuse of the process of the Court, I also award costs quantified at Rs.15000/- of the present petition payable by the petitioners to the respondent trust.